



## DEPARTMENT OF AGRICULTURE

### Forest Service

### 36 CFR Part 222

### RIN 0596-AD45

### Assessing Fees for Excess and Unauthorized Grazing

**AGENCY:** Forest Service, Agriculture (USDA).

**ACTION:** Final rule.

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**SUMMARY:** The Forest Service (Agency), U.S. Department of Agriculture, hereby adopts this final rule to amend existing regulations for the provision of an option to waive excess and unauthorized grazing fees when excess or unauthorized grazing is determined to be a result of unforeseen or uncontrollable circumstances. This standard is consistent with the practices of the U.S. Department of the Interior, Bureau of Land Management, as recommended by the Government Accountability Office (GAO) in its July 2016 report to the Committee on Natural Resources, House of Representatives, *Unauthorized Grazing, Actions Needed to Improve Tracking and Deterrence Efforts*.

**DATES:** This rule is effective [insert date 60 days after publication in the *Federal Register*].

**FOR FURTHER INFORMATION CONTACT:** David Lytle, Director, Forest and Rangeland Management and Vegetation Ecology, 928-419-7738, [David.Lytle@usda.gov](mailto:David.Lytle@usda.gov). Individuals who use telecommunication devices for the deaf/hard-of-hearing (TDD) may call the Federal Relay Service (FRS) at 1-800-877-8339, 24 hours a day, every day of the year, including holidays.

### SUPPLEMENTARY INFORMATION:

#### Background

The Forest Service manages National Forest System (NFS) lands that provide forage for domestic livestock grazing. The Forest Service's authority to regulate livestock grazing comes

from the Organic Administration Act of 1897, as amended (16 U.S.C. 551). The Forest Service first introduced regulations requiring grazing permits and imposing fees for grazing on the forest reserves, and later the national forests, in 1906. The Forest Service managed grazing under its general authorities until 1950, when Congress enacted the Granger-Thye Act (16 U.S.C. 5801), specifically authorizing the Secretary of Agriculture to issue grazing permits on NFS lands and other lands administered by the U.S Department of Agriculture. The Forest Service permits the occupancy and use of NFS lands by domestic livestock through grazing and livestock use permits in accordance with the regulations at 36 CFR part 222. Pursuant to 36 CFR 222.50(a), the Agency is required to charge fees “for all livestock grazing or livestock use of National Forest System lands, or other lands under Forest Service control.”

Congress asked the Government Accountability Office (GAO) to examine what is known about the frequency and extent of unauthorized grazing on Federal lands and its effects. This examination included a review of the Bureau of Land Management (BLM) and Forest Service efforts to detect, deter, and resolve unauthorized grazing.

In July 2016, GAO issued a Report to the Committee on Natural Resources, House of Representatives, *Unauthorized Grazing, Actions Needed to Improve Tracking and Deterrence Efforts* (GAO-16-559). In the report, the GAO found that the frequency and extent of unauthorized grazing on NFS lands is largely unknown because according to Agency officials, the Agency handles most incidents informally (for example, with a telephone call) and does not document them. The incidents that were documented involved formal action taken by the Agency rangeland management program or law enforcement staff, such as issuance of a Notice of Non-Compliance and/or a Bill for Collection.

The GAO recommended that the Forest Service record all incidents of unauthorized grazing, including those resolved informally, as well as revise the excess and unauthorized grazing penalty structure to reflect the commercial value of forage. The Agency is responding to these two recommendations, but not as a part of this rulemaking process. Instead, the Agency

has developed direction for implementing these two recommendations in the proposed Forest Service Manual and Handbook for Rangeland Management, which was released for public review and comment on December 18, 2020, for a 60-day comment period and extended for an additional 60-day comment period, ending April 17, 2021. (85 FR 82432, 86 FR 9048).

The GAO report also recommended the Forest Service either amend the regulations to allow the option to resolve excess and unauthorized grazing use without charging fees in some instances or follow the existing regulations by determining and charging a grazing use penalty for all unauthorized and excess use. Given the vast amount of land covered, and the wide array of natural and unnatural events that may occur across a variety of landscapes, the Agency believes it is important to have reasonable flexibility that allows for a commonsense approach to resolving certain instances of excess and unauthorized grazing use. In limited circumstances, when the use occurs because of unforeseen or uncontrollable circumstances, having the ability to waive excess and unauthorized grazing use fees will help to quickly resolve the issue while maintaining cooperative relationships. Therefore, the Forest Service amends its regulations at 36 CFR 222.50(h) to include an option for waiving the excess and unauthorized use fees when excess or unauthorized grazing use is a result of unforeseen or uncontrollable circumstances and meets all three conditions identified in the rule. Per the regulations at 36 CFR 261.2, unauthorized livestock are defined as livestock which are not authorized to be upon the land on which the livestock are located, and which is not related to use authorized by a grazing permit. “Excess livestock” are defined as livestock owned by the holder of a National Forest System grazing permit, but grazing on NFS lands in greater numbers, or at times or places other than permitted in Part 1 of the grazing permit or authorized on the annual Bill for Collection (FSM 2230.5).

On November 2, 2020, the Agency published a proposed rule (85 FR 69303) to revise 36 CFR 222.1(b) to add definitions of “non-permittee” and “non-willful,” to remove the numbering of definitions in that section (36 CFR 222.1(b)) and revise 36 CFR 222.50(h) to provide an

option for nonmonetary settlement for excess or unauthorized grazing use. Following a 30-day comment period, the Agency received 33 unique, individual comments in response to the proposed rule. Most of the unique comments expressed support for the Agency's effort to provide an option to resolve excess and unauthorized grazing use cases without charging fees when the grazing use was at no fault of the livestock owner, while some commenters expressed confusion or concern regarding terms and statements, such as "nonmonetary settlement," "non-willful," and "in the interest of the United States." A detailed summary of comments on the proposed rule and the Agency's responses, including changes made to the final rule language, is set forth below.

### **Summary of the Final Rule**

The final rule carries forward the proposed amendments in the definitions section at 36 CFR 222.1(b), adopting the definition of "non-permittee," as well as restating the definitions section to remove the numbering and update the formatting to be consistent with the Federal Register Document Drafting Handbook (August 2018 Edition, Revision 1.1 dated August 9, 2019; National Archives and Records Administration). Minor grammatical and technical edits were also made.

The final rule does not add a definition for "non-willful", nor does it use that term in revised 36 CFR 222.50(h). The proposed rule used and defined the term "non-willful" as "an action which is inadvertent or accidental, and not due to gross negligence." Several commenters expressed views that by using the term "non-willful", the Forest Service was implying a requirement that a determination of intent be made. The Forest Service agrees; therefore, we do not propose to require a determination of intent for the excess or unauthorized grazing use. Accordingly, to avoid confusion, the term "non-willful" has been removed in the final rule at 36 CFR 222.50(h) and is no longer in the definitions section at 36 CFR 222.1(b). It is replaced with the terms "unforeseen" and "uncontrollable" in the final rule to describe the circumstances for when excess or unauthorized use can be considered for a fee waiver. The terms "unforeseen"

and “uncontrollable” are not added to the definitions section in the final rule, and the ordinary meaning of these terms shall apply. The Forest Service authorized officer will have the discretion to decide when a circumstance leading to unauthorized grazing was unforeseen or uncontrollable.

The final rule also does not use the term “non-monetary”, which the proposed rule used to characterize the action of not charging fees for excess and unauthorized grazing use that was considered non-willful. Commenters expressed confusion over the term “non-monetary settlement” and exactly what it meant. Some commenters expressed views that fees should be charged for all grazing use. To clarify intent in the final rule, the term “non-monetary settlement” has been replaced with language allowing an option to “waive” the fees. The option to waive the fees is intended to make the rule clear and concise such that all excess and unauthorized grazing use shall be charged unless the specific conditions set forth in the regulation are met, at which time the authorized officer may then decide to “waive” the excess or unauthorized grazing use fees. The only instances of excess and unauthorized use where a waiver of excess or unauthorized grazing use fees may be considered are those instances that occur after this rule has become effective.

The final rule carries forward the proposed amendment to 36 CFR 222.50(h) to provide the authorized officer an option to waive the excess or unauthorized grazing use fees when the use is a result of unforeseen or uncontrollable circumstances, and when certain conditions set forth in the regulation are met.

The final rule carries forward the removal of the reference in the current regulation to the fee being adjusted by the same indexes used to adjust the regular fee, as well as the removal of the reference to an unvalidated permit and replaces it with the four most common situations in which the Forest Service encounters excess or unauthorized use.

There were a few commenters who expressed views that the Agency was proposing to not charge for any excess and unauthorized grazing use. Therefore, language has been added to

the final rule to highlight the relationship to 36 CFR 222.50(a) and make it clear that a grazing fee shall be charged for all grazing use. As always, the exact rate applied to the grazing use depends on whether such use is authorized or not. Title 36 CFR 222.51, 222.52, 222.53, and 222.54 describe the grazing fees charged for authorized grazing use and are not affected by this rulemaking. The excess and unauthorized use rate is applied to all grazing use made without authorization, which is described within 36 CFR 222.50(h). The final rule allows the option to waive the excess and unauthorized grazing use fee when the use was a result of unforeseen or uncontrollable circumstances and all three of the specified conditions set forth in the regulation at 36 CFR 222.50(h) are met.

Commenters expressed concern that the permittee or non-permittee would not be contacted or that they would not be required to take corrective action relative to excess or unauthorized use. Therefore, the final rule language was updated to make it clear that livestock would have to be removed by the permittee or non-permittee within the timeframe required by the authorized officer. The clarification was added to the first condition of the criteria that is required to be met before a line officer can consider a waiver of fees for excess or unauthorized use. This change is also warranted as the Agency would be unable to determine if conditions #2 and #3 of the criteria have been met if the livestock remains on NFS lands.

Commenters expressed concern and confusion over condition #4 of the criteria as presented in the proposed rule. Some commenters felt that it is never in the interest of the United States to allow excess and unauthorized use to occur free of charge, while other commenters felt that condition #4 allowed for too much discretion and would result in inconsistency across the Agency. Due to the comments received and internal Agency discussion of a similar nature, condition #4 of the criteria was removed to facilitate the clear and consistent implementation of the rule.

Some commenters expressed concern about using the terms “significant” in condition #2 and “significantly” in condition #3 of the criteria. The basis of the concern is related to how

“significance” would be determined on the ground in each excess and unauthorized use case. For the purposes of the final rule, the meaning of the terms “significant” and “significantly” are unrelated to the terms as used in the context of the National Environmental Policy Act of 1969. Instead, the Forest Service uses the term “significant” in condition #2 in the ordinary meaning of the word to help field staff differentiate between a use level that is undetectable or slightly used versus a level that exceeds grazing standards that are common for the area. The level of forage use that could be considered significant will vary across the National Forest System lands because different resource conditions exist across those lands at any given time. The Forest Service authorized officer will consider the site-specific conditions to inform the decision as to whether the amount of forage consumed as a result of excess or unauthorized grazing was significant.

The term “significantly” is used in condition #3 of the criteria to help field staff differentiate between levels of impacts resulting from excess or unauthorized use. The term is used in the ordinary sense or meaning of the word to allow Forest Service personnel to differentiate between impacts that are undetectable or minor in nature where no restoration or intervention efforts are needed versus impacts that impair the management and viability of the area, creating a situation where rehabilitation or intervention is needed, or other management options need to be employed.

## **Comments on the Proposal**

### *General Comments*

Comments expressed a wide range of opinions—both strongly for and against—the proposed rule. Comments expressing support for the proposed rule stated that it was a fair means to deal with excess and unauthorized use that was a result of circumstances beyond the livestock owner’s control, or otherwise due to unforeseen or uncontrollable circumstances. Other comments, however, opposed various provisions of the proposed rule, expressing concern that the revisions could: (1) reward intentional bad behavior; (2) result in increased overgrazing

and greater resource damage; (3) result in increasing excess and unauthorized use; (4) result in less incident documentation.

*Response:* The Agency notes the general comments in support of or in opposition to the rule. The Agency has carefully considered the input from the public, other government entities, and Tribes and has made several adjustments to the final rule to address the concerns described above. These changes are described in more detail below and include, for example, changing the terminology from “non-monetary settlement” to an option to “waive” the excess and unauthorized use fees. Throughout the rulemaking process, the Agency’s goal has been to develop a final rule that enables the Agency to have an option to not charge for excess and unauthorized use when it is minimal and due to unforeseen or uncontrollable circumstances and not due to negligence of the livestock owner. The final rule achieves this goal and is consistent with the practices of the Bureau of Land Management and recommendations of the GAO July 2016 report.

The Agency’s final rule does not eliminate or modify the existing policy to charge for all grazing use, to possibly take administrative action against a grazing permit, or to apply the penalties at 36 CFR part 261. Instead, it adds the option to waive the excess and unauthorized use fees when the use was due to unforeseen and uncontrollable circumstances and the three criteria in the final rule are met. Further, the Agency will continue to comply with the requirements of all applicable laws and regulations and continue to document and charge for all livestock grazing use and may waive the associated fees under limited circumstances when all the required criteria are met.

The three required criteria that must be met are: (1) The excess or unauthorized use was a result of unforeseen or uncontrollable circumstances on behalf of the permittee or non-permittee and the livestock associated with such use were removed by the permittee or non-permittee within the timeframe required by the authorized officer; (2) The forage consumed by

the excess or unauthorized use is not significant; and (3) National Forest System lands have not been damaged significantly by the excess or unauthorized use.

Criterion #1 (so long as criteria 2 and 3 are also met) will isolate the excess or unauthorized livestock use to the single unforeseen or uncontrollable event.

Criterion #2 will ensure that forage use made during the excess or unauthorized use is considered. It will help field staff differentiate between a use level that is undetectable or slightly used versus a level that exceeds grazing standards that are common for the area to determine if a fee waiver may be an available option or not (so long as criteria 1 and 3 are also met).

Criterion #3 will ensure that the excess or unauthorized livestock use did not damage other aspects of the National Forest System lands. It is intended to allow staff to differentiate between impacts that are undetectable or minor in nature where no restoration or intervention efforts are needed versus impacts that impair the management and viability of the area, creating a situation where rehabilitation or intervention is needed, or other management options need to be employed. This criterion along with criteria 1 and 2 are intended to act in concert when reviewing the site-specific information to determine if the waiver of the excess and unauthorized use fee would be appropriate.

*Comment:* Some commenters suggest that there is a need to require direction to record all incidents of excess and unauthorized grazing use.

*Response:* The U.S. Forest Service has determined the development of policy to document all occurrences of excess and unauthorized grazing use was best resolved through internal administrative direction. Therefore, in April 2019, the Washington, DC office sent a letter to the Regional Foresters, directing documentation and billing for all cases of excess and unauthorized grazing use that equals or is greater than one head month of use. All documentation is to be filed in the 2230 grazing permit files and database for excess use and is to be documented and resolved in cooperation with law enforcement personnel for unauthorized

use. The final rule provides an option for waiver of excess or unauthorized use fees when excess and unauthorized grazing use is due to unforeseen or uncontrollable circumstances, and cases will continue to be documented in the 2230 grazing permit files and database, even if no excess or unauthorized use fees were charged.

In December 2020, the U.S. Forest Service released the proposed rangeland management directives (Forest Service Manual (FSM) 2200 and Forest Service Handbook (FSH) 2209.13 and 2209.16). The proposed rangeland management directives include updated requirements and direction for documenting all excess and unauthorized grazing use and working with the livestock owner to resolve the incident. A checklist has been developed to be included as an exhibit in the final directives. The exhibit will serve as an example of how to document occurrences of excess and unauthorized use and if the three criteria have been met to allow the authorized officer the option to waive the fees. Future updates to the Rangeland Information Management System database are being considered to further aid in tracking and future reporting of excess and unauthorized grazing use and any waivers of associated fees.

*Comment:* Some commenters suggest the Forest Service comply with the existing regulations instead of amending regulations to allow for not charging an excess and unauthorized use fee.

*Response:* The GAO report recommended the Forest Service either amend the regulations to allow the option to resolve excess and unauthorized grazing use without charging fees in some instances or follow the existing regulations by determining and charging a grazing use penalty for all unauthorized and excess use. Given the vast amount of land covered, and the wide array of natural and unnatural events that may occur across a variety of landscapes, the Agency believes it is important to have reasonable flexibility which allows for a commonsense approach to resolving certain instances of excess and unauthorized grazing use. In limited circumstances, when the use occurs because of unforeseen or uncontrollable circumstances, having the ability to waive excess and unauthorized grazing use fees will help to quickly resolve the issue while

maintaining cooperative relationships. Therefore, the Forest Service amends its regulations at 36 CFR 222.50(h) to include an option for waiving the excess and unauthorized use fees when excess or unauthorized grazing use is a result of unforeseen or uncontrollable circumstances and meets all three conditions identified in the rule.

*Comment:* Some commenters requested that the excess and unauthorized grazing penalty structure be revised, and fees increased to better deter excess and unauthorized grazing use.

*Response:* The U.S. Forest Service determined that the issue of revising the excess and unauthorized grazing fee was best resolved through internal administrative direction. The grazing penalty structure is addressed administratively through revision of the Forest Service Handbook (FSH) 2209.13 which was published December 18, 2020, for public comment (85 FR 82432). The FSH provides direction for calculating and assessing the annual excess and unauthorized grazing use fees. The proposed FSH 2209.13 includes updates to the excess and unauthorized use rate which reflect the commercial value of forage.

*Comment:* Some commenters suggested avoiding the term “non-willful” or better define the term and differentiate between “non-willful” and “willful”.

*Response:* The U.S. Forest Service is no longer including the term “non-willful” within the rule language and the definitions section as finalized, thus eliminating confusion over any perceived requirement to assess the intent of the livestock owner. Instead, the terms unforeseen and uncontrollable are used within criteria #1 to better articulate what circumstances must exist for the authorized officer to consider waiving excess and unauthorized grazing use fees.

The Forest Service will rely upon the ordinary meaning of the terms unforeseen and uncontrollable. As defined by the Oxford Languages Dictionary, unforeseen is an adjective meaning “not anticipated or predicted”, “unplanned”, “unexpected”. As defined by the Oxford Languages Dictionary, uncontrollable is an adjective meaning “not controllable”, “out of control”, “unmanageable”.

It is the livestock owner's responsibility to keep livestock off National Forest System lands when they are not permitted and authorized to make use of those lands. However, there are circumstances that occur beyond the control of the livestock owner that cannot be predicted. For example, when a predator attacks a band of sheep causing the sheep to scatter and move outside the authorized routing pattern or allotment area. This example demonstrates how the predation event caused the sheep to be in areas that were not authorized, resulting in excess use. The predator attack was unforeseen and uncontrollable by the permittee and the Forest Service.

Another example would be when an automobile accident occurs and damages a private landowner's fence. The private landowner's llamas get out and are grazing on National Forest System lands. This example demonstrates how the automobile accident damaged the fence, allowing the llamas to get out and graze on National Forest System lands, resulting in unauthorized use. The automobile accident was unforeseen and uncontrollable by the landowner and the Forest Service.

The terms unforeseen or uncontrollable are intended to strike a balance between providing the Forest Service reasonable flexibility when those types of situations arise while also ensuring undesirable behavior and/or repeat instances of excess and unauthorized use are addressed to reform the behavior and deter any future instances.

*Comment:* Some commenters suggested that the rule should not apply to National Grasslands or grazing associations because grazing associations are issued grazing agreements (which the commenter suggested are not a type of term grazing permit). They suggested the rule is not consistent with the Bankhead-Jones Farm Tenant Act of 1937 or that a specific rule should be written that describes how grazing associations would apply the rule when managing their members.

*Response:* Authority for managing the National Grasslands comes from Title III of the Bankhead-Jones Farm Tenant Act (BJFTA) of 1937, as amended. The portions of Title III that are most applicable are found in Sections 31 (7 U.S.C. 1010) and 32(b) and (f) (7 U.S.C. 1011).

In these provisions, the Secretary of Agriculture was granted authority “[t]o make such rules and regulations as he deems necessary to prevent trespasses and otherwise regulate the use and occupancy of property acquired by, or transferred to, the Secretary for the purposes of this subchapter, in order to conserve and utilize it or advance the purposes of this subchapter” (7 U.S.C. 1011(f)). This includes the regulations found in 36 CFR part 222.

National Grasslands are part of the National Forest System per Section 10 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1609). Management of the National Grasslands as part of the National Forest System must be conducted in a manner that is consistent with the regulations that apply to National Forest System lands which does include the revised regulations resulting from this final rulemaking.

Regarding the comment that “a specific rule should be written that describes how grazing associations would apply the rule when managing their members,” a separate rule specific to National Grasslands is not needed. As stated above, the management of the National Grasslands as part of the National Forest System must be conducted in a manner that is consistent with the regulations that apply to all National Forest System lands. The Forest Service enters into grazing agreements with grazing associations which are a type of term grazing permit (36 CFR 222.3(c)(1)). The Forest Service applies law, regulation and policy to the association when administering the grazing agreement. The grazing associations are then responsible for managing their members’ livestock grazing on the lands identified in the grazing agreement. How a grazing association manages its members is articulated in the association’s rules of management (ROM). There may be times where an association’s ROM might be more restrictive than Federal law, regulation, or Forest Service policy and/or procedure, but they cannot be less restrictive. This includes the revised regulations related to excess grazing use resulting from this final rulemaking. This means that grazing associations are accountable to the Forest Service for any excess use made by their members, and the Forest Service may waive the

fee for the association if all three conditions are met. Alternatively, if any of the criteria are not met, then the Forest Service will charge the association for the grazing use.

There are some allotments where direct permittees and grazing associations are authorized to graze livestock in common. In those instances, the Forest Service will apply this rule to all parties holding grazing permits, whether they are direct grazing permits or grazing permits in the form of a grazing agreement.

## **Regulatory Certifications**

### *Regulatory Planning and Review*

For rules designated as significant by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget, Executive Order (EO) 12866, as supplemented by EO 13563, directs agencies to conduct a regulatory impact analysis, including an assessment of costs and benefits (i.e., cost-benefit analysis) of the regulatory action and its alternatives, and select regulatory approaches that maximize net benefits to both the Government and the public regarding economic impacts, the environment, public health and safety, distributive impacts, and equity considerations.

Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reduced costs, of harmonized rules, and of promoting flexibility. Analysis is required to assess both the costs and benefits of the intended regulation, recognizing quantifiable analysis is not always possible, but that a reasoned determination be made that the benefits justify the regulatory costs. The final rule has been determined to be significant for the purposes of Executive Order 12866, and therefore, has been reviewed by the Office of Management and Budget.

Costs and benefits can accrue to ranchers, private industry, the agency, and to the public. Generally, industry could benefit from fewer penalty fees for excess and unauthorized use determined to meet the three circumstances identified in the rule. The agency could benefit from less time and resources spent assessing and collecting the penalty fees.

The Agency conducted a regulatory impact analysis for the final rule to amend existing regulations to allow for excess and unauthorized grazing fees to be waived if the use is a result of “unforeseen” or “uncontrollable” circumstances, a departure from existing policy which doesn’t formally allow for such considerations (36 CFR part 222, subpart C). This analysis considers costs and benefits to the agency (Government), livestock operators, and the public.

The regulatory impact analysis compares impacts between the current and final rules. Savings to industry are minimal but seen as a benefit. The savings are estimated from an average cost of fees assessed multiplied by the average number of excess or unauthorized use cases eligible for fee waivers per year. To determine the anticipated number of excess or unauthorized use cases eligible for fee waivers under the final rule, the agency used data from 2017 to 2020 on the number of livestock, the duration the livestock were on National Forest System lands, and the total amount of head months associated with the excess or unauthorized use cases.

The cost-benefit analysis identifies the potential economic costs and benefits associated with the final rule. Changes in benefits and cost savings result from 1) waived fees for excess and unauthorized use and 2) associated changes in processing times for the waivers and fees. Baseline conditions are equal to operations under existing regulations and policy.

While the regulations set forth in 36 CFR part 222 apply to all National Forest System land, a review of grazing records from the last four years show that permit-holders and land managers in the western United States would be most impacted by the rule change. In 2020 alone, authorized livestock in the Forest Service’s Northern (Region 1), Rocky Mountain (Region 2), Southwestern (Region 3), and Intermountain (Region 4) regions accounted for 88 percent of total authorized use on National Forest System lands. These regions encompass the states of Arizona, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming. Though excess and unauthorized use can occur on any National Forest System lands, by permittees and non-permittees, it is important to understand the magnitude of grazing and distribution across the land. The rule is not expected to change the

production of forage or livestock; therefore, economic impacts from grazing on National Forest System lands are not expected to change. We do not expect the excess or unauthorized use to change, only the penalties would change for those uses that meet the conditions to have the fees waived.

It is unlikely the rule will adversely affect the natural resources or visiting public, as a condition for the rule to apply is that “the forage consumed by the excess or unauthorized use was not significant, and National Forest System lands had not been damaged significantly by the excess or unauthorized use.”

Under baseline conditions, the cost is the time for industry and the agency to process bills for collection from excess or unauthorized use. Each reported case of excess or unauthorized use requires a bill for collection to be processed. In addition to the billing and collection, Forest Service staff also need to assess the damage and determine the extent of the bill.

Overall, we do not expect costs to industry, the agency, or the public from the final rule. The time to process each bill for collection will not change. The costs will likely be lower than the baseline condition because less time would be spent overall on bills for collection because some cases could have fees waived.

As a whole, the agency believes that, though benefits have not been monetized, the rule will have positive net benefits due to the improved relationships and more timely resolution of excess and unauthorized use to minimize resource damage.

### *Energy Effects*

The USDA has considered the final rule in the context of Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*, issued May 18, 2001. The USDA has determined the final rule does not constitute a significant energy action as defined in Executive Order 13211. Therefore, a statement of energy effects is not required.

### *E-Government Act*

The USDA is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to government information and services, and for other purposes.

#### *Civil Rights Impact Analysis*

A Civil Rights Impact Analysis (CRIA) was conducted in accordance with USDA Departmental Regulation (DR) 4300-4, to determine if the implementation of the final rule would have disproportionate effects or adverse impacts on employees or program beneficiaries, because of membership in protected groups identified in USDA DR 4300-4 (regarding Civil Rights) and DR 5600-002 (regarding Environmental Justice), particularly women, ethnic and racial minorities, and people with disabilities. The final rule has been analyzed to ensure compliance with USDA's DR 4300-4, and it is determined that no adverse impacts on protected groups are expected as a result of the implementation of the final rule.

#### *Congressional Review Act*

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA has designated this final rule as 'not a major rule' as defined by 5 U.S.C. 804(2).

#### *National Environmental Policy Act*

The final rule would provide an option for the authorized officer to waive the excess or unauthorized grazing use fee when the use met the following criteria: (1) the excess or unauthorized use was a result of unforeseen or uncontrollable circumstances on behalf of the permittee or non-permittee and the livestock associated with such use were removed by the permittee or non-permittee within the timeframe required by the authorized officer; (2) the forage consumed by the excess or unauthorized use is not significant; and (3) National Forest System lands have not been damaged significantly by the excess or unauthorized use. Agency regulations at 36 CFR 220.6(d)(2) exclude from documentation in an environmental assessment or environmental impact statement, as well as in a decision memo, rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions. The

amendment to §§ 222.50(h) and 222.1(b) addresses the penalty for excess and unauthorized grazing actions taken on National Forest System land and provides a definition for a term used in the amended language. The final language removes reference to an unvalidated permit and replaces it with the four most common situations that the Forest Service considers excess or unauthorized use, which is not intended to be an exclusive list. This final rule fits within this category because it is a service-wide administrative action regulating financial policy and fees limited to determination of waiver of excess or unauthorized use fees. Moreover, an administrative action that regulates financial policy and waiver of fees in a limited situation is not authorizing any ground disturbing activities, nor is it authorizing any activities in areas where there are extraordinary circumstances that exist per 36 CFR 220.6(b). Thus, the Agency has concluded that the final rule falls within this category of actions and that no extraordinary circumstances exist which would require the preparation of an environmental assessment or environmental impact statement.

#### *Regulatory Flexibility Act Analysis*

The Regulatory Flexibility Act (RFA) requires the agency to “prepare and make available for public comment an initial regulatory flexibility analysis” which will “describe the impact of the proposed rule on small entities.” (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

A certification must include, at a minimum, a description of the affected entities and the impacts that clearly justify the “no impact” certification. The agency’s reasoning and assumptions underlying its certification should be explicit to obtain meaningful public comment and thus receive information that would be used to re-evaluate the certification.

For the changes to 36 CFR part 222, subpart C, this rule affects permittees classified under the North American Industry Classification System (NAICS), as follows:

- NAICS Code 112410, Sheep Farming

- NAICS Code 112111 Beef Cattle Ranching and Farming

Most Forest Service grazing permittees would be considered small entities under SBA standards (owner-operators, some with LLC. designations, and others operating under an agreement with Grazing Associations). The central purpose of the final rule is the flexibility to informally resolve excess and unauthorized grazing incidents, that are a result of unforeseen or uncontrollable circumstances by waiving the excess or unauthorized grazing penalties. Informal resolution involves the permittee or non-permittee removing the livestock following a phone call from or face-to-face conversation with the authorized officer. Since the excess or unauthorized grazing penalties would be waived, any settlement or action would be of the nonmonetary nature and reduce the administrative burden on livestock operators by allowing for a waiver of fees of a situation that would typically require an administrative process to resolve.

The cost savings are due to anticipated changes in fees paid by the industry to the agency as a result of fee waivers for eligible cases of excess or unauthorized use. The cost savings are considered transfer payments. Cost savings, though minimal, would result from waived fees and reduced time assessing and processing bills. The amount of time to process a fee waiver and process a bill for collection would be the same up to the point where the Forest Service either decides to waive the fees or issue a bill for collection. The agency and industry are expected to experience cost savings from the reduced time processing and collecting excess and unauthorized use fees. While the cost savings to industry from the fee waivers would result in less government revenue, this is not planned government revenue that benefits the public. The fees are a penalty. The goal is full compliance with existing laws, meaning no fees assessed for excess and unauthorized use.

As such, the Chief of the Forest Service certifies that this rule would not have a significant economic impact on a substantial number of small entities as defined by the Regulatory Flexibility Act.

*Federalism*

The Agency has considered the final rule under the requirements of E.O. 13132, *Federalism*. The Agency has determined that the final rule conforms with the federalism principles set out in this executive order; would not impose any compliance costs on the states; and would not have substantial direct effects on the States, on the relationship between the Federal government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, the Agency has concluded that the final rule does not have federalism implications.

*Consultation and Coordination with Indian Tribal governments*

The Forest Service considered this final rule in compliance with E.O. 13175, *Consultation and Coordination with Indian Tribal Governments*. On October 30, 2020, the agency initiated a 120-day consultation period. While consultation was ongoing, the comment period for this rule concluded on February 27, 2021. The Forest Service also considered input from Tribes received after this period. Two federally recognized Tribes accepted the invitation to consult and submitted written material on the rule.

One Tribe expressed support for the proposed rule, and one Tribe expressed concern that the rule would encourage excessive damage and degradation to our fragile ecosystems.

In response, the Forest Service maintains and reiterates its commitment to charge for all grazing use and enforce its grazing regulations. The final rule is of limited scope and amends the Forest Service grazing regulation to merely provide the authorized officer an option to waive the excess and unauthorized use fee only if all 3 criteria within the regulation are met. Of particular applicability is criteria #3 which requires that only those instances of excess or unauthorized use that did not significantly damage National Forest System lands could be considered for a waiver. All other instances would be charged for along with other administrative actions or penalties depending upon the circumstances.

The Agency acknowledges that it shares a government-to-government relationship with Tribes that differs from its relationship with the general public. The final rule does not change the Forest Service's Tribal consultation obligations.

#### *No Takings Implications*

The Agency has analyzed the final rule in accordance with the principles and criteria in E.O. 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights*. The Agency has determined that the final rule would not pose the risk of a taking of private property.

#### *Civil Justice Reform*

The Forest Service has analyzed the final rule in accordance with the principles and criteria in E.O. 12988, *Civil Justice Reform*. The Agency has not identified any State or local laws or regulations that conflict with this regulation or that would impede full implementation of this rule. Nevertheless, if such conflicts were to be identified, the final rule will preempt the State or local laws or regulations that are found to be in conflict. However, in the case of such conflict, (1) no retroactive effect will be given to this final rule; and (2) USDA will not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

#### *Unfunded Mandates Reform Act*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), signed into law on March 22, 1995, the Agency has assessed the effects of the final rule on State, local, and Tribal governments and the private sector. The final rule would not compel the expenditure of \$100 million or more by any State, local, or Tribal government or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

#### *Controlling Paperwork Burdens on the Public*

The final rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required

by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

### **List of Subjects in 36 CFR Part 222**

Grazing and Livestock Use on the National Forest System, Mediation of Term Grazing Permit Disputes, Grazing Fees, Management of Wild Free-Roaming Horses and Burros.

Therefore, for the reasons set forth in the preamble, part 222, subparts A and C, of title 36 of the Code of Federal Regulations is amended as follows:

### **PART 222 – RANGE MANAGEMENT**

#### **Subpart A – Grazing and Livestock Use on the National Forest System**

1. Revise the authority citation for subpart A to read as follows:

**Authority:** 92 Stat. 1803, as amended (43 U.S.C. 1901), 85 Stat. 649, as amended (16 U.S.C. 1331-1340); sec. 1, 30 Stat. 35, as amended (16 U.S.C. 551); sec. 32, 50 Stat. 522, as amended (7 U.S.C. 1011).

2. In § 222.1, revise paragraph (b) to read as follows:

#### **§ 222.1 Authority and definitions.**

\* \* \* \* \*

(b) *Definitions.*

*Allotment* means a designated area of land available for livestock grazing.

*Allotment management plan* means a document that specifies the program of action designated to reach a given set of objectives. It is prepared in consultation with the permittee(s) involved and:

(i) Prescribes the manner in and extent to which livestock operations will be conducted in order to meet the multiple-use, sustained yield, economic, and other needs, and objectives as determined for the lands, involved; and

(ii) Describes the type, location, ownership, and general specifications for the range improvements in place or to be installed and maintained on the lands to meet the livestock grazing and other objectives of land management; and

(iii) Contains such other provisions relating to livestock grazing and other objectives as may be prescribed by the Chief, Forest Service, consistent with applicable law.

*Base property* means land and improvements owned and used by the permittee for a farm or ranch operation and specifically designated by him to qualify for a term grazing permit.

*Cancel* means action taken to permanently invalidate a term grazing permit in whole or in part.

*Grazing permit* means any document authorizing livestock to use National Forest System or other lands under Forest Service control for the purpose of livestock production including:

(i) Temporary grazing permits for grazing livestock temporarily and without priority for reissuance.

(ii) Term permits for up to 10 years with priority for renewal at the end of the term.

*Land subject to commercial livestock grazing* means National Forest System lands within established allotments.

*Lands within the National Forest in the 16 contiguous western States* means lands designated as National Forest within the boundaries of Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming (National Grasslands are excluded).

*Livestock* means animals of any kind kept or raised for use or pleasure.

*Livestock use permit* means a permit issued for not to exceed one year where the primary use is for other than grazing livestock.

*Modify* means to revise the terms and conditions of an issued permit.

*National Forest System lands* means the National Forests, National Grasslands, Land Utilization Projects, and other Federal lands for which the Forest Service has administrative jurisdiction.

*Non-permittee* means a person who owns or controls livestock and does not have a grazing permit to graze livestock on National Forest System lands.

*On-and-off grazing permits* means permits with specific provisions on range, only part of which is National Forest System lands or other lands under Forest Service control.

*On-the-ground expenditure* means payment of direct project costs of implementing an improvement or development, such as survey and design, equipment, labor, and material (or contract) costs, and on-the-ground supervision.

*Other lands under Forest Service control* means non-Federal public and private lands over which the Forest Service has been given control through lease, agreement, waiver, or otherwise.

*Permittee* means any person who has been issued a grazing permit.

*Permitted livestock* means livestock authorized by a written permit.

*Person* means any individual, partnership, corporation, association, organization, or other private entity, but does not include Government Agencies.

*Private land grazing permits* means permits issued to persons who control grazing lands adjacent to National Forest System lands and who waive exclusive grazing use of these lands to the United States for the full period the permit is to be issued.

*Range betterment* means rehabilitation, protection, and improvement of National Forest System lands to arrest range deterioration and improve forage conditions, fish and wildlife habitat, watershed protection, and livestock production.

*Range betterment fund* means the fund established by title IV, section 401(b)(1), of the Federal Land Policy and Management Act of 1976. This consists of 50 percent of all monies

received by the United States as fees for grazing livestock on the National Forests in the 16 contiguous western States.

*Range improvement* means any activity or program designed to improve production of forage and includes facilities or treatments constructed or installed for the purpose of improving the range resource or the management of livestock and includes the following types:

(i) Non-structural which are practices and treatments undertaken to improve range not involving construction of improvements.

(ii) Structural which are improvements requiring construction or installation undertaken to improve the range or to facilitate management or to control distribution and movement of livestock.

(A) Permanent means range improvements installed or constructed and become a part of the land such as: dams, ponds, pipelines, wells, fences, trails, seeding, etc.

(B) Temporary means short-lived or portable improvements that can be removed such as: troughs, pumps and electric fences, including improvements at authorized places of habitation such as line camps.

*Suspend* means temporary withholding of a term grazing permit privilege, in whole or in part.

*Term period* means the period for which term permits are issued, the maximum of which is 10 years.

*Transportation livestock* means livestock used as pack and saddle stock for travel on the National Forest System.

### **Subpart C – Grazing Fees**

3. The authority citation for subpart C continues to read as follows:

**Authority:** 16 U.S.C. 551; 31 U.S.C. 9701; 43 U.S.C. 1751, 1752, 1901; E.O. 12548 (51 FR 5985).

4. In § 222.50, revise paragraph (h) to read as follows:

**§ 222.50 General procedures.**

\* \* \* \* \*

(h) The excess and unauthorized grazing use rate will be determined by establishing a base value without giving consideration for those contributions normally made by the permittee under terms of the grazing permit. This rate is charged for unauthorized forage or forage in excess of authorized use and is separate from any penalties that may be assessed for a violation of a prohibition issued under 36 CFR part 261 or from an administrative permit action. This rate will apply to, but not be limited to, the following circumstances: excess number of livestock grazed; livestock grazed outside the permitted grazing season; livestock grazed in areas not authorized under a grazing permit and a bill for collection; or livestock grazed without a permit. Per paragraph (a) of this section, a grazing fee shall be charged for each head month of livestock grazing or use. This includes any excess or unauthorized grazing use. The authorized officer may then waive monetary fees for excess or unauthorized grazing use only when all three of the following conditions are met:

(1) The excess or unauthorized use was a result of unforeseen or uncontrollable circumstances on behalf of the permittee or non-permittee, and the livestock associated with such use were removed by the permittee or non-permittee within the timeframe required by the authorized officer;

(2) The forage consumed by the excess or unauthorized use is not significant; and

(3) National Forest System lands have not been damaged significantly by the excess or unauthorized use.

\* \* \* \* \*

Dated: June 6, 2022.

**Randy Moore,**

*Chief, USDA Forest Service.*